



*working through science, law and creative media to secure a future for all species,  
great or small, hovering on the brink of extinction.*

July 23, 2015

*Via Electronic Mail and First Class Mail*  
U.S. Environmental Protection Agency, Region IX  
Regional Freedom of Information Act Officer  
75 Hawthorne Street (OPA-2)  
San Francisco, CA 94105  
(415) 947-4251  
Via email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

*Re: FOIA Request for Status Report of 30 Injection Wells and California District 1 Evaluation*

Dear Freedom of Information Act Officer:

Please accept this request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), on behalf of the Center for Biological Diversity (“Center”). The Center is a national, nonprofit conservation organization with more than 825,000 members and online activists dedicated to protecting endangered species and wild places. Combining conservation biology with litigation, policy advocacy, media outreach and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction and the wilderness they need to survive. The Center’s Climate Law Institute works to curb global warming and other air pollution, and to sharply limit damaging effects of air pollution and fossil fuel extraction on endangered species and their habitats, and on all of us who depend on clean air, a safe climate, and a healthy web of life.

### **Background**

A letter from U.S. EPA Region IX, dated May 28, 2015 (“May 28, 2015 EPA letter,” Attachment 1 to this request) notes that the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) has identified 53 wastewater disposal wells that “have total dissolved solids (TDS) concentrations below 3,000 ppm and have the potential to impact water supply wells.” (Attachment 1 at p. 2.) EPA notes that 23 of the 53 wells have been shut down according to DOGGR, but the status of the remaining 30 wells (“30 High-risk Wells”) purportedly remains uncertain. (Ibid.) EPA asked DOGGR to clarify the status of the 30 High-risk Wells “within the next two weeks” of the letter. (Ibid.)

More recently, on July 15, 2015, DOGGR and the California State Water Resources Control Board (Water Board) sent EPA Region IX a letter (“July 15, 2015 DOGGR letter,” Attachment 2 to this request) describing DOGGR’s progress in addressing widespread violations of the federal Safe Drinking Water Act. In Attachment 2 to the July 15, 2015 DOGGR letter, DOGGR states that it has performed an evaluation of injection projects located in the Cypress District (Division District 1) (Id. at pp. 5-6.) DOGGR states that a draft report has been prepared and is under final administration review. (Ibid.)

### *Request 1:*

*The Center requests any and all documents containing information regarding or related to the 30 High-risk Wells described by EPA in the May 28, 2015 EPA letter.*

*Request 2:*

*The Center requests any and all documents containing information related to the evaluation of District 1 (Cypress) injection projects referred to in the July 15, 2015 DOGGR letter. This includes, but is not limited to, draft and final versions of the evaluation and communications related to the content of the evaluation.*

**A. Provision of Information Under the Freedom of Information Act**

In 2007, Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007. 5 U.S.C. § 552. In the Congressional findings to the OPEN Government Act, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” 110 Pub. L. No. 175 § 2(2). In addition, Congress found that “disclosure, not secrecy, is the dominant objective of [FOIA].” *Id.* § 2(4) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976)). Thus, under FOIA, there is a “strong presumption in favor of disclosure.” *Id.* § 2(3) (quoting *Dep’t of State v. Ray*, 502 U.S. 164 (1991)).

In a March 19, 2009 memorandum to the heads of executive departments and agencies, Attorney General Eric Holder underscored that agencies should release records requested under FOIA even if the agency might have a technical excuse to withhold them:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

Memorandum of Attorney General E. Holder (March 19, 2009).

**B. Fee Waiver Request**

We request that EPA waive all fees in connection with this matter. The Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by EPA's fee-waiver regulations at 40 C.F.R. § 2.107(1).

In considering this fee waiver request, it is imperative that EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups like the Center access to government documents without the payment of fees. Both Congress and the case law make it clear that the fee waiver provision is intended to facilitate access to agency records by “watchdog” organizations, such as the Center, which use FOIA to monitor government activities. The waiver provision was added to FOIA “‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.” *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986), *quoting Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). As stated by one Senator, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). The Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

## **The Information Requested Should Be Made Available under FOIA**

### **I. The subject of the request concerns “the operations and activities of the government.”**

The subject matter of this FOIA request relates directly to the operations and activities of the federal government. 5 U.S.C. § 552(a)(4)(iii). The requested documents and records pertain to EPA’s responsibilities and obligations to protect the nation and its citizens from the harmful effects of water pollution. It is clear that such management, as well as EPA’s overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted). The requested documents pertain to groundwater protected under the Safe Drinking Water Act and associated regulations. Thus the FOIA request plainly concerns the operations or activities of the government.

### **II. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).**

There is no question that the documents requested will contribute to an understanding of federal government operations. The documents requested are new and are not in the public domain. To the extent EPA has documents pertaining the requests above, these documents will undoubtedly provide meaningful understanding of the state of California’s groundwater supply. Thus, production of the requested documents is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

### **III. The disclosure of the requested information will contribute to “public understanding.”**

The information requested will contribute to public understanding of how EPA is discharging its duties and those of DOGGR under existing laws including the Safe Drinking Water Act to protect water quality and human health and welfare. The information requested will also provide the Center, Center members, and the public to which the Center disseminates information, with insight into the status of California’s groundwater. The requested documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute significantly to better public understanding of the operations of or activities of the government concerning the underground sources of drinking water. 5 U.S.C. §552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

Public understanding of the new information will be achieved because the Center intends to use the new information that it receives to educate the public by informing the public about the lack of protection of groundwater in California during a time of historic drought.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA. In consistently granting the Center’s fee-waivers, agencies have recognized that the Center possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. For instance, the Center has several staff scientists and attorneys who have the ability to assess and digest the requested information, and the Center has the capacity to publish reports regarding that information. The Center’s informational publications supply information not only to its membership, but also to the memberships of most other conservation organizations, locally as well as nationally. In addition, our informational publications are disseminated to the media and are available on our website to the general public.

The Center provides information we receive from FOIA requests to the public in a variety of formats. Information such as that requested is regularly disseminated in e-mail newsletters and action alerts to more than 825,000 members and online activists, and in tweets to more than 30,000 followers on Twitter. Three times per year it sends a printed newsletter to more than 50,000 members. In addition, our publications supply information not only to our membership, but also to the memberships of many other conservation organizations, locally as well as nationally. Our publications also continue to contribute information to public media outlets. Information may be disseminated through any or all of these media. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

Release of the information will also empower members of Center, and members of the public, to engage in public advocacy efforts to protect and conserve California's underground sources of drinking water, and to more effectively evaluate the need for litigation or grassroots action.

#### **IV. The disclosure is likely to contribute significantly to public understanding of government operations or activities.**

Public oversight and enhanced understanding of EPA and DOGGR's duties is absolutely necessary. The Center's track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure is well established.

The requested information is certain to shed light on the Underground Injection Control Program in California, and will also help show whether or not DOGGR and the EPA are acting properly, and the possible effects of these respective agencies' action or inaction. The documents are new and are not in the public domain. The public's understanding of these matters, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value.

#### **V. Obtaining the information is of no commercial interest to the Center**

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

#### **C. Conclusion**

The Center thus qualifies for a fee-waiver, and we hope that you will promptly begin to collect the requested material. Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at (510) 844-7133. We look forward to a reply within twenty working days, as required by the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A). Failure to respond in a timely manner shall be viewed as a denial of this request, and may result in our immediately filing an administrative appeal. Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, reading "Hollin Kretzmann". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Hollin Kretzmann  
Staff Attorney  
Center for Biological Diversity  
1212 Broadway Suite 800  
Oakland, CA 94612

# ATTACHMENT 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

May 28, 2015

Jonathan Bishop  
Chief Deputy Director  
California State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-100

Steven Bohlen  
State Oil and Gas Supervisor  
Division of Oil, gas, and Geothermal Resources  
California Department of Conservation  
801 K Street. MS-18-05  
Sacramento, CA 95814-3530

Dear Messrs. Bishop and Bohlen:

Thank you for your May 15, 2015 letter describing the recent steps taken to address ongoing compliance issues with California's Class II Underground Injection Control (UIC) program. Your letter discussed the State's efforts to issue emergency regulations for Class II wells, conduct well reviews/evaluations, update the inventory of potential injection wells of concern, including cyclic steam wells, and issue enforcement and information collection orders to injection well operators.

Emergency Rulemaking for Injection Wells

The State's emergency regulations to codify deadlines for injection well operators to cease injection, absent EPA-approved aquifer exemptions, is a critical step in the State's plan to return the California Class II UIC program to compliance with the Safe Drinking Water Act. We look forward to the State's continued progress in this important administrative process by initiating a permanent rulemaking. Your letter indicates this initiation is on schedule to commence June 1, 2015.

Drinking Water Protection Well Evaluations

As we noted in our letter of March 9, 2015, it is important to identify the full universe of wells that are injecting into non-exempt aquifers, and to prioritize the review of these wells based on the potential risk to high quality ground water and existing water supply wells. Your May 15<sup>th</sup> submittal described completion of an initial review of Category 1 injection wells (i.e., Class II disposal wells injecting into non-exempt, non-hydrocarbon bearing aquifers, and those injecting into the 11 aquifers historically treated as exempt). As part of this review, you identified 53 disposal wells injecting into aquifers that have total

dissolved solids (TDS) concentrations below 3,000 ppm and have the potential to impact water supply wells, based on your initial screening criteria. To date, the State has assured shut-in of 23 of these 53 wells. For the remaining 30 wells in this sub-category, I understand that the Department of Conservation will clarify the status of each of these 30 wells within the next two weeks and take appropriate action (e.g., shut-in order, permit rescission) for any of the wells that could otherwise impact water supply wells. Please inform EPA of the State's evaluation of the 30 wells as soon as these determinations are made.

In addition, your letter describes 207 injection wells disposing into non-hydrocarbon-producing aquifers with 3,000-10,000 ppm TDS levels that you have determined require a more in-depth review to assess the need for further action to protect existing water supply wells. Since the purpose of the well evaluations/reviews is specifically to identify and address situations where injection wells are potentially impacting existing water supplies, it is critical for the State to expedite completion of this review. As we recently discussed, EPA strongly recommends that any of these 207 disposal wells that are within a one-mile radius of a water supply well be given top priority for completion of this review and immediate action to cease injection operations found to potentially endanger existing water supply wells. Please provide further information on the status of these disposal wells as your review continues, and no later than our next monthly update in June.

#### Updated Injection Well Inventory

In response to EPA's request, the State's May 15<sup>th</sup> submittal included information about roughly 3,600 cyclic steam wells (a type of well that injects steam into a hydrocarbon-producing zone and also produces oil from the same wellbore) that may be injecting outside currently exempt zones. According to your letter, these wells are not associated with a permitted injection project in the Division's databases. In our recent discussions, you clarified that these cyclic steam wells would be included by the State as additional Category 2 wells – Class II enhanced oil recovery (EOR) wells injecting into non-exempt, hydrocarbon-bearing aquifers. As your letter notes, the Category 2 wells are scheduled to be reviewed and analyzed by July 31, 2015. In addition, the State has a target of submitting 90% of proposed aquifer exemptions for Category 2 wells by February 15, 2016. The final compliance deadline for the Category 2 injection wells, as codified in the State's recent emergency regulations, is February 15, 2017.

#### Enforcement and Information Collection Orders

The State's submittal included information on the 23 wells shut-in by enforcement orders or through voluntary permit relinquishment, as well as 157 other injection wells that received orders from the applicable Regional Water Quality Control Boards for data collection purposes. As the State continues to receive data from operators and evaluate the potential for injection wells to impact water supply wells, EPA expects to receive regular updates of these activities. EPA should be notified immediately if any injection well is determined to be potentially endangering an existing water supply well. Other updates should be provided as a regular item on our monthly update meeting agenda.



We look forward to continued efforts to protect California's drinking water resources and ensure full compliance with the Safe Drinking Water Act. Please don't hesitate to contact me if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Montgomery", with a long horizontal flourish extending to the right.

Michael Montgomery  
Associate Director  
Water Division

## ATTACHMENT 2



DEPARTMENT OF CONSERVATION  
*Managing California's Working Lands*  
DIVISION OF OIL, GAS, & GEOTHERMAL RESOURCES



July 15, 2015

Mr. Michael Montgomery  
United States Environmental Protection Agency – Region IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

Dear Mr. Montgomery:

We are continuing to forge through our review of the status of active injection wells, receive operator information concerning aquifer exemption proposals, and work on several other agreed tasks necessary to update California's Class II underground injection program.

As part of this ongoing effort, we agreed to submit the following to you by today: (1) a preliminary assessment of whether data currently supplied to us demonstrates that each of the aquifers historically treated as exempt presently meets the criteria for an aquifer exemption; (2) a plan and timeframe for addressing the closure of those injection wells for which there is insufficient evidence that the zone of injection meets the criteria for an aquifer exemption; (3) a detailed plan for Class II program improvements; and (4) an outline of our intended course of action for obtaining public comment on our aquifer exemption communications.

Each of these items is addressed, in turn, below. We conclude with updates on a variety of related items.

1. Preliminary Assessment of 11 Aquifers Historically Treated As Exempt

Attachment 1 to this letter is the Division's *Preliminary Assessment of Eleven Aquifers Historically Treated As Exempt*. It discusses, by field and formation, the following information for each aquifer: (1) the number and location of injection wells; (2) the concentration, in milligrams per liter, of total dissolved solids (TDS) that is representative for each aquifer; (3) the TDS of the injected fluids for each aquifer; (4) the depth of injection historically; and (5) volumes injected since 1983, in barrels.

One of the eleven aquifers, the undifferentiated aquifer in Wild Goose Field, may have TDS in excess of 10,000 mg/L. If so, it would not be considered a USDW and thus would require no evaluation at this juncture. As for the remaining aquifers, the Division's preliminary assessment is that most or all may not meet the criteria for an

aquifer exemption. Currently available information indicates that, aside from the undifferentiated aquifer in Wild Goose Field, the aquifers contain between 400 and 3,325 mg/L total dissolved solids, and are found at depths as shallow as 200 feet and not deeper than 3,000 feet. However, there are residual water quality questions to be resolved concerning these aquifers that may support exemptions, and we are continuing to work with operators to resolve data gaps.

Five of the eleven aquifers appear to have no wells actively injecting. The Division believes it is unlikely that any operator will endeavor to collect and present new information regarding those aquifers. The Division will likely conclude its evaluation of those aquifers sooner than it will for the aquifers in which injection is occurring. We will continue to be in regular communication and provide you with updates on our progress as we go.

The Division has been in communication with the operators that have injection wells in these aquifers to see if they have any additional information that would support a determination that an aquifer, or part of an aquifer, meets the aquifer exemption criteria. Although the Division has yet to receive complete information supporting such a determination, the Division believes it is likely that it will be receiving such information for at least one of the 11 aquifers. If information is in fact presented that the Division and State Water Board agree would support a determination that an aquifer, or part of an aquifer, meets the criteria for exemption, the Division will conduct a public process, including a joint hearing with the State Water Board. It will then submit its final determination to U.S. EPA.

Likewise, if it becomes clear that operators cannot provide information that supports a determination that an aquifer meets the criteria for exemption, the Division will deem its evaluation complete for that aquifer. At that point, the Division will issue public notice proposing a determination that the aquifer fails to meet the criteria for exemption, and allow for public comment on that proposed determination. After completing the public participation process, the Division will submit its final determination to the U.S. EPA and request that it take appropriate action as to the exempt status of that aquifer.

2. Plan and Timeframes for Addressing the Closure of Injection Wells for Which There Is Insufficient Evidence That the Receiving Aquifer Meets the Criteria for an Aquifer Exemption

Under the plain language of our emergency regulations and proposed permanent regulations, improper injection activity must end by the relevant deadline agreed to by our respective agencies unless the activity is within a duly-approved aquifer exemption. We fully intend to adhere to the timeframes created by these regulations. Where no exemption is obtained going forward, either because exemption criteria are not met, or because the submittal of relevant data did not occur in time for any of the

three involved agencies to reasonably act, such injection must end until an appropriate exemption is obtained. (Cal. Code Regs., Tit. 14, §§ 1760.1, 1779.1.)

If an affected operator fails to obtain an aquifer exemption by the relevant time, the operator would be in violation of the regulations, and be subject to a notice of violation and order to comply, as warranted.

Of course, injection wells can be, and have been, shut in prior to the applicable deadline under our regulations. As you know, we have been focusing our energies on identifying wells in proximity to waters of beneficial use before widening our review to other wells, and have obtained the shut in of 23 wells to date, either by order or by agreement with the operator. We are continuing to review wells in potential proximity to beneficial uses and will obtain permit relinquishments or issue shut-in orders as warranted.

### 3. Detailed Plan for Class II Program Improvements

The Division's current plan to address UIC Program improvements, including actions taken to date, a project by project review, rulemaking, training, monitoring and compliance and other activities is set forth in Attachment 2 to this letter, *Plan for Class II Improvements*.

### 4. Public Participation in Aquifer Exemption Process

Though not explicitly required at this juncture, in Attachment 3 to this letter, *Public Participation Process For Aquifer Exemption Proposals*, we generally describe for you our intended course of action for providing interested members of the public with notice of, and an opportunity to comment upon, our intention to recommend an exemption or state that exemption criteria have been met in a given case.

### 5. Other Matters

In our discussions, we agreed to a "soft" or "target" deadline of July 15 for the State to submit to you all applications for aquifer exemptions for wells scheduled to be shut in by October 15, 2015. As we recently discussed with you, to date we have not received adequate data to prepare an aquifer exemption application for the aquifers associated with this deadline.

Once we finish our work with those operators who submit packages, the packages will be circulated to the State Water Board and other interested administration officials. If there is agreement that an aquifer exemption application should go forward, the application will be scheduled for a 30 day notice and public comment period before it is finally sent to your agency for a final determination.

Mr. Michael Montgomery  
July 15, 2015  
Page 4

As we recently confirmed to you, we have made it clear to the operators in workshops and in our regulations that (1) the earlier their data packages get to us, the more likely they will be to obtain a final determination from US EPA prior to any deadline to shut in certain classes of wells, and (2) that where no exemption is obtained by the deadline, operations must be shut in.

We trust you will contact us with any questions or concerns, and we look forward to our further discussions of the process as we work together to improve California's Class II program.

Sincerely,



Steve Bohlen  
State Oil and Gas Supervisor  
Division of Oil, Gas and Geothermal  
Resources

Sincerely,



Jonathan Bishop  
Chief Deputy Director  
State Water Resources Control Board

#### Attachments

cc: Cliff Rechtschaffen, Senior Advisor, Governor's Office  
John Laird, Secretary, California Natural Resources Agency  
Matthew Rodriguez, Secretary, California Environmental Protection Agency  
David Bunn, Director, California Department of Conservation